Filed 5/17/19 In re K.B. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re K.B., A Person Coming Under the Juvenile Court Law.	B290464 (Los Angeles County Super. Ct. No. 18LJJP00164)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MAURICE B., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Steven E. Ipson, Judge. Affirmed in part, reversed in part and remanded with direction.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Veronica Randazzo, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Maurice B. (Father) the father of K.B. (K.) appeals the juvenile court's jurisdictional order finding that Father's "criminal history and conduct" and status as a registered controlled substance offender endangered his child's physical health and safety and placed him at risk of serious physical harm, damage and danger. He also appeals the court's denial of his request for custody under Welfare and Institutions Code section 361.2.[1] We conclude the court's factual findings with respect to Father did not support assertion of jurisdiction and reverse the jurisdictional finding. We further conclude that the court applied the incorrect statute in rejecting Father's request for custody and erroneously placed the burden of proof on Father to establish lack of detriment. Accordingly, we reverse and

---

[1] Undesignated statutory references are to the Welfare and Institutions Code.

remand for reconsideration of Father's request for custody under section 361.2 and the appropriate burden of proof.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Prior Proceeding*

In June 2013, the court asserted jurisdiction over K. based on Father's act of felony spousal assault on April 17, 2013 and "prior occasions." The prior petition, reports and witness statements were not included in the record, but the current reports stated that K.'s mother, M.L. (Mother) accused Father of "push[ing] her, chok[ing] her, dragg[ing] her," and "hit[ting] her with a belt . . . ." The current reports indicated that Mother also had been assaulted in 2012 and had obtained a restraining order requiring Father to stay away, but nonetheless continued to have contact with him.

As a result of the 2013 jurisdictional findings, Mother and K. were placed in a family maintenance program, and Mother completed a domestic violence education class. Father, who was incarcerated for the assault, was ordered to complete a 52-week domestic violence course, but failed to fully comply. The case was closed in December 2013, with an order giving Mother sole physical and legal custody.[2]

---

[2] Juvenile court orders terminating jurisdiction and providing for future custody and visitation are generally known as "family law" or "exit" orders. (*In re Maya L.* (2014) 232 Cal.App.4th 81, 101; see § 362.4.)

B. *Current Proceeding*

More than four years later, in February 2018, the family again came to the attention of the Department of Children and Family Services (DCFS). K., then five, and Mother were living with the maternal grandmother (MGM). After being asked to leave the MGM's home, Mother vandalized it and attacked the MGM, punching her, biting her, and throwing bricks and knives at her. K. became frightened and hid under the bed. The officers who took Mother into custody said she smelled strongly of alcohol. The MGM expressed concern that Mother was taking drugs or had mental health issues, describing her behavior as increasingly erratic and claiming to have seen cocaine in Mother's possession.

In March 2018, K. was detained from Mother's custody and left in the care of the MGM. At the time, Father's whereabouts were unknown.

Father was located in April and referred to drug testing. He tested positive for a small amount of marijuana. He had a prescription for the drug, and said he used it occasionally for pain. He said he had completed 22 domestic violence classes but had been unable to complete the program, as he had been arrested for drug possession and referred to a substance abuse program. He presented a certificate of completion of a six-month substance abuse program. In the years since the 2013 proceeding, Father had completed probation and obtained a GED and a job. He requested custody of K., stating he planned to move in with

his mother, K's paternal grandmother (PGM), to assist him with child care.[3]

Father had an extensive criminal history. His juvenile record included battery and carjacking. In 2013, he was convicted of felony corporal injury to a spouse or cohabitant (Mother), and sentenced to five years of formal probation and 365 days in jail. In 2016, he was sentenced to 16 months in prison for possession of a controlled substance for sale. At that time, he was required to serve additional time for the corporal injury offense. There was also evidence suggesting he served time in Nevada for carjacking in 2014.

At the jurisdictional hearing, Father's counsel asked the court to dismiss the sole allegation pertaining to him, an allegation asserting that he was "a Registered Controlled Substance Offender" and that his "criminal history and conduct endanger[ed] [K.'s] physical health and safety and place[d] the child at risk of serious physical harm, damage and danger." Counsel contended there was no nexus between the factual allegations and any risk of harm to K. Counsel pointed out that Father's substance abuse offense occurred two years earlier and that there was no evidence of current drug use. DCFS's counsel brought up the two domestic violence incidents from 2012 and 2013, contending Father "failed to comply with anything that he was ordered to do," and alleged that Father was engaging in "ongoing

---

[3] The caseworker assessed the PGM's residence and found it clean with no safety concerns.

substance abuse." The court sustained the allegation, finding that it supported jurisdiction under section 300, subdivision (b).[4] The court described both the domestic violence conviction and the possession for sale conviction as "recent," and stated that there was an "adequate nexus" between the conduct alleged in the petition and danger to K. It did not otherwise explain its reasoning.

When the court turned to disposition, Father's counsel asked that K. be released to his care under section 361.2. DCFS's counsel stated that DCFS opposed release to Father due to (1) his positive marijuana test; (2) the sustained allegation concerning drug possession; (3) the 2013 exit order limiting him to monitored visits; and (4) the 2012/2013 incidents of domestic violence and Father's failure to complete the ordered domestic violence program. The court found there was "[a] problem" with respect to releasing K. to Father because "the [2013 exit] order only allows monitored visits" and had "never been . . . modifi[ed]." Father's counsel contended the court was required to look at the present circumstances to determine whether Father posed a risk to his child, and could not rely on what had occurred in 2013. The court stated there were no "new facts" to suggest Father

---

[4] The court also found true that Mother assaulted the MGM in the presence of K., causing injury to the MGM and causing K. to become frightened of Mother. The findings pertinent to Mother are not at issue in this appeal.

no longer posed a risk to K., and that it did not see how it could modify the prior order "without having any basis to do so." Father's counsel identified multiple "new facts" for the court to consider: Father had stayed out of trouble with the law for two years, he had completed a drug program, and there had been no domestic violence allegations since 2013.[5] The court asked DCFS's counsel if she knew the basis for the monitored visitation required by the 2013 order. Counsel did not. The court then stated its intention to "go along with the family law order." It made no findings under section 361.2. It found by clear and convincing evidence, pursuant to section "361(c)," that there would be a substantial danger to K. if he were to be "returned home," and that there were no means by which the child's physical and emotional health could be protected "without removal from the parents' custody."

The court-ordered reunification plan required Father to complete the domestic violence course previously begun and to drug test six times. The court initially stated that Father would be required to complete another substance abuse

---

[5] K.'s counsel expressed "some concern" that the child would be "bouncing around a little bit" between the grandparents' homes, but said his concern did not "rise[] to a safety level as much as just consistency in the child's life." He also expressed misgivings about Father's "lack of candor" with respect to his criminal conduct in Nevada, but acknowledged that overall, the recent reports were "positive" for Father, as he had been "working" and was "stable."

program if any test was positive for any drug. Father's counsel pointed out that Father used marijuana for medical reasons and had previously tested positive for a low level of cannabinoids. The court then clarified that a reading "over 200" would require participation in a substance abuse program. Father appealed the jurisdictional and dispositional orders.

DISCUSSION

A. *Jurisdictional Finding*

The court asserted jurisdiction over K. under section 300, subdivision (b). A child may be adjudged a dependent of the court under that provision if the child "has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." (§ 300, subd. (b)(1).) A true finding under this subdivision requires evidence of """" serious physical harm or illness""" to the child, or "'a substantial risk . . . of such harm or illness . . . .'

[Citations.]" (*In re D.L.* (2018) 22 Cal.App.5th 1142, 1146.) Proof of this element ""effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future . . . ."" (*Ibid.*, italics omitted, quoting *In re B.T.* (2011) 193 Cal.App.4th 685, 692.) "Evidence of past conduct may be probative of current conditions." (*In re D.L.*, *supra*, at p. 1146; accord, *In re James R.* (2009) 176 Cal.App.4th 129, 135-136, abrogated in part on another ground in *In re R.T.* (2017) 3 Cal.5th 622.)

DCFS bears the burden of proving, by a preponderance of the evidence, that the minor comes under the juvenile court's jurisdiction. (*In re M.R.* (2017) 7 Cal.App.5th 886, 896; see § 355, subd. (a).) On appeal, "'we must uphold the court's [jurisdictional] findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings.'" (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022.)

The sole jurisdictional findings pertaining to Father stated that he was a "Registered Controlled Substances Offender," apparently due to his having been convicted of possession for sale in 2016, and that he had a "criminal history," not otherwise described. Father contends these findings are insufficient to support the conclusion that he posed a danger to K.'s physical health and safety and placed

the child at risk of serious physical harm.[6] We agree. As many courts have said, dependency jurisdiction cannot be established based solely on a parent's criminal conduct and incarceration; "[t]here is no 'Go to jail, lose your child' rule in California." (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1077; accord, *In re M.R.*, *supra*, 7 Cal.App.5th at pp. 896-897; *Maggie S. v. Superior Court* (2013) 220 Cal.App.4th 662, 672; see also *In re Noe F.* (2013) 213 Cal.App.4th 358, 369 ["[A] finding of detriment [for purposes of disposition] cannot be based solely on the fact a parent is incarcerated."].)

Respondent contends the 2013 domestic violence conviction supported the jurisdictional finding, particularly in view of Father's failure to complete the domestic violence

---

[6] Father acknowledges that this appeal will not deprive the court of jurisdiction over K., as he does not challenge the findings concerning Mother's violent behavior. (See *In Alexis E.* (2009) 171 Cal.App.4th 438, 451 [single true finding may support court's assertion of jurisdiction, and reviewing court "need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence"].) Respondent contends the appeal thus does not present a justiciable issue and should be dismissed. We decline to do so. An appellate court will generally consider the merits of a parent's appeal of a jurisdictional finding when it "'serves as the basis for dispositional orders that are also challenged on appeal [citation]'" or "'"could have other consequences for [the appellant], beyond jurisdiction" [citation].'" (*In re M.W.* (2015) 238 Cal.App.4th 1444, 1452.) Here, the contested jurisdictional findings served as a basis for the dispositional order limiting Father's custody and visitation, which is also challenged on appeal. Accordingly, we address the merits.

program. The jurisdictional finding cannot be sustained based on allegations not found in the petition. (See *In re Andrew S.* (2016) 2 Cal.App.5th 536, 542, 544 [reversing jurisdictional finding where petition alleged incarcerated father failed to provide children with necessities of life, but court instead found father failed to protect children from mother's physical abuse: "the Department never made any such allegation; and [father] had no notice or opportunity to defend against it"].) Here, the petition contained no allegations pertaining to domestic violence or failure to complete a domestic violence program.[7] Moreover, as respondent acknowledges, the domestic violence incidents occurred years ago, and Father is no longer in a relationship with Mother or anyone else. If DCFS believed K. remained in danger from Father's 2012/2013 conduct in 2018, it could have presented that allegation in its petition to the court, along with evidence supporting it, including evidence indicating Father's conduct was likely to recur. Instead, DCFS improperly relied on Father's recent criminal activity

---

[7] Respondent also contends Father's criminal conduct caused him to be "absen[t] from [K.'s] life" and "unable to provide the necessary care and supervision his child needed." There was evidence in the record that after his release from incarceration in 2017, Father occasionally visited K. when K. was with the PGM. In any event, absence from a child's life due to incarceration is not a ground for assertion of jurisdiction. (See § 300, subd. (g); *In re Andrew S.*, *supra*, 2 Cal.App.5th at p. 543 [juvenile court may assert jurisdiction over child of incarcerated parent only if parent could not arrange to have child cared for while incarcerated].)

having no connection to domestic violence to convince the court that Father posed a continued risk to his child, arguing that the fact he "commit[ted] other crimes ending in incarceration on at least two occasions" supported assertion of jurisdiction under section 300, subdivision (b). There was no evidence Father's recent criminal activity endangered K., for example, that he abused drugs or engaged in criminal activity when with the child, or left drugs in any place to which the boy had access. Indeed, there was no evidence he ever used drugs, other than the test showing a small amount of marijuana in his system, which the court found inconsequential. Accordingly, we must conclude the jurisdictional finding was improperly based on Father's status as a criminal and reverse it.[8]

B. *Dispositional Order*

Reversal of the jurisdictional finding does not necessarily require reversal of the dispositional order denying Father custody. Regardless of whether the noncustodial parent seeking custody at the dispositional

---

[8] Although we reverse the jurisdictional finding, DCFS is free after remand to assert jurisdiction on an alternate ground, should one exist. (See *In re Anna S.* (2010) 180 Cal.App.4th 1489, 1501 ["[W]hen an appellate court reverses a prior order of the [juvenile] court on a record that may be ancient history to a dependent child, the [juvenile] court must implement the final appellate directive in view of the family's current circumstances and any development in the dependency proceedings that may have occurred during the pendency of the appeal."].)

hearing is offending or nonoffending, the court must determine whether placement with that parent "would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).)[9] The court made a finding of detriment, albeit under the wrong provision -- section 361, subdivision (c), rather than section 361.2. (See § 361, subd. (c) [permitting court to "remove" child from physical custody of parents or guardians "with whom the child resides at the time the petition was

---

[9] As respondent points out, some courts have held that section 361.2 applies only to a nonoffending parent, including within the definition of "offending," a parent who was previously the subject of a dependency petition and never regained custody. (See *In re A.A.* (2012) 203 Cal.App.4th 597, 606-608; accord, *In re John M.* (2013) 217 Cal.App.4th 410, 423-424.) However, we agree with the analysis of *In re Nickolas T.* (2013) 217 Cal.App.4th 1492 (*Nickolas T.*), in which the court held "[s]ection 361.2, subdivision (a) does not automatically exclude from consideration for placement a noncustodial parent who has a history of incarceration, institutionalization or prior involvement with child dependency proceedings. Instead, it directs the court to place the child with the parent unless placement would be detrimental to the child." (*Id.* at p. 1504.) The court based its conclusion on the absence of the term "nonoffending" from the text of section 361.2, subdivision (a), and on "the statutory scheme as a whole," which requires a finding of detriment to remove a child from the custody of an offending custodial parent, and presumes that parent is entitled to regain custody at every review hearing unless the agency proves detriment. (*Id.* at pp. 1504, 1505; accord, *In re D'Anthony D.* (2014) 230 Cal.App.4th 292, 301; *In re V.F.* (2007) 157 Cal.App.4th 962, 966.)

initiated"]; *In re Julien H.* (2016) 3 Cal.App.5th 1084, 1089 [juvenile court cannot remove child from parent's physical custody under section 361, subdivision (c)(1) unless child was residing with that parent when petition initiated]; accord, *In re Dakota J.* (2015) 242 Cal.App.4th 619, 632; *In re Abram L.* (2013) 219 Cal.App.4th 452, 460; *In re V.F.*, *supra*, 157 Cal.App.4th at p. 969.)

Although the court erred in failing to assess Father's request for custody under section 361.2, such error is often deemed harmless because the standards under section 361 and section 361.2 are sufficiently similar. (See, e.g., *In re D'Anthony D.*, *supra*, 230 Cal.App.4th at p. 303.) Here, however, we reverse and remand due to confusion over the appropriate procedure and standard of proof when a noncustodial parent, like Father, who has lost custody in a prior dependency proceeding, seeks custody under section 361.2 in a new proceeding.

Section 361.2 "'evinces the legislative preference for placement with the noncustodial parent when safe for the child. [Citation.]' [Citation.] It requires placement with a noncustodial, nonoffending parent who requests custody 'unless the placement would be detrimental to the child.' [Citation.]" (*In re C.M.* (2014) 232 Cal.App.4th 1394, 1401.) "To comport with due process, the detriment finding must be made under the clear and convincing evidence standard. [Citations.] Clear and convincing evidence requires 'a high probability, such that the evidence is so clear as to leave no substantial doubt. [Citation.]' [Citations.]" (*Ibid.*)

As explained in *Nickolas T.*, even where the parent seeking custody was "the subject of a finding of detriment in an earlier dependency case and did not retain the right to physical custody of the child," there is a "presumption for placement with a noncustodial parent at a disposition hearing," requiring the agency to prove detriment. (*Nickolas T., supra,* 217 Cal.App.4th at pp. 1496, 1505.) "A prior detriment finding is not given preclusive effect . . . . The burden of proof to show detriment is on the agency and the fact a home is not ideal is not sufficient to establish detriment." (*Id*. at p. 1505; accord, *In re Liam L.* (2015) 240 Cal.App.4th 1068, 1085-1086 [where noncustodial parent requests custody after dispositional hearing by way of a section 388 petition for modification, court "must place the child with the noncustodial parent unless the opposing party establishes that the placement would be detrimental to the child's safety, protection, or physical or emotional well-being"].) The presumption in favor of placement with a noncustodial parent at the dispositional hearing, even an offending parent, "is consistent with the statutory scheme as a whole, and furthers the legislative goals to maintain or place a child in the care of a parent when safe for the child, strengthen the child's relationship with siblings and other relatives, and avoid the child's placement in foster care. [Citations.]" (*Nickolas T.*, *supra*, at pp. 1505-1506.) In assessing whether the party opposing placement has met its burden, the juvenile court must consider whether the noncustodial parent, "despite earlier shortcomings and

mistakes, has stabilized his or her circumstance and may be able to provide a safe home for the child." (*Id.* at p. 1506.) "[N]otwithstanding a previous removal order or detriment finding," the noncustodial parent "may have remedied the conditions that led to the prior dependency proceedings, maintained a parental relationship with the child and stabilized his or her circumstances." (*Ibid.*)

In making its dispositional findings, the court suggested that in the absence of "new facts" to support modification of the 2013 exit order, the court was obliged to "go along" with it. The court apparently believed it was Father's burden to present "new facts" to persuade the court there was "[a] basis" for modifying the order. In fact, under section 361.2, the burden was on DCFS to support the existence of detriment to K. if placed with Father. On remand, the court is to reconsider whether detriment exits under the correct burden of proof, "current circumstances," and "any developments . . . that may have occurred during the pendency of the appeal." (*In re Anna S.*, *supra*, 180 Cal.App.4th at p. 1501.)

DISPOSITION

That portion of the court's jurisdictional order pertaining to Father is reversed. That portion of the court's dispositional order rejecting Father's request for custody is reversed. In all other respects, the court's jurisdictional and dispositional orders are affirmed. The matter is remanded for further proceedings in conformity with the views expressed in this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

COLLINS, J.

CURREY, J.